

claimant and also ordered claimant's outstanding medical benefits to be paid. Claimant argues for the first time on appeal that the Judge's actions violated the rules of estoppel.

Claimant argues he was an employee of respondent and, therefore, he is entitled to benefits under the Workers Compensation Act. In the alternative, claimant argues for the first time on appeal that he was a statutory employee of respondent, as contemplated by K.S.A. 44-503.

Finally, claimant also argues for the first time on appeal that the Workers Compensation Fund (Fund) should be estopped from now contesting liability as it did not deny liability at the April 2, 2002 preliminary hearing that was held in this claim. Claimant notes the Fund did not appeal the April 2, 2002 Order.

Accordingly, claimant requests the Board to (1) reverse the May 21, 2002 Order, (2) assess penalties against respondent and the Fund for their failure to comply with the April 2, 2002 Order, and (3) reinstate the April 2, 2002 preliminary hearing Order.

Conversely, the Workers Compensation Fund contends the May 21, 2002 Order should be affirmed. The Fund argues the parties should not be estopped from now contesting liability as claimant allegedly failed to give respondent notice of the April 2, 2002 hearing and, therefore, respondent, who possessed all knowledge of the facts surrounding claimant's status as an employee, did not appear at that hearing. The Fund also argues the evidence now establishes that claimant was not an employee of respondent as the person who purportedly hired claimant, Kenny Weber, did not have that authority. Finally, the Fund argues that preliminary hearing findings are not final but, instead, subject to modification as the facts develop in a claim. Therefore, the Fund argues the Judge acted properly by modifying the earlier April 2, 2002 Order.

Although requested, respondent did not brief the issues now before the Board. Accordingly, the Board is without the benefit of respondent's analysis of the issues and its position on their proper resolution.

The issues now before the Board on this appeal are:

1. Did the Judge err at the May 21, 2002 hearing by addressing the issue of whether claimant was an employee of respondent when he was injured?
2. If not, was claimant an employee of respondent on the date of the alleged accident?
3. Is claimant entitled to penalties from the Fund for the alleged failure to pay medical bills?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

The Judge did not err by accepting evidence at the May 21, 2002 hearing on the issue of whether claimant was an employee of respondent at the time of the alleged September 2001 accident.

While claimant and the Workers Compensation Fund appeared for a preliminary hearing on April 2, 2002, neither respondent nor its legal counsel appeared.¹ As a result, no testimony was taken at the April 2002 hearing and no issues were raised. The administrative file indicates that following the April 2002 hearing, the Fund scheduled this claim for a preliminary hearing on May 21, 2002.² Later, on May 1, 2002, claimant filed notice that a penalties hearing was scheduled for the same date as the May 2002 preliminary hearing. When the parties appeared before the Judge on May 21, 2002, the Judge conducted only one hearing to address the penalties request and the issue of whether claimant was respondent's employee on the date of accident. Regarding the penalties request, the Judge and counsel stated the following at the conclusion of the hearing:

(Mr. Appling) I would mention one thing. I think there's a request for penalties there, Your Honor.

(Judge Clark) I know.

(Mr. Appling) And you know the Fund's position on that then, too?

(Judge Clark) I know the law on that, too. All right. Thank you, gentlemen. Claimant's Exhibit No. 1 will be admitted.

(An off-the-record discussion was had, after which, the following:)

(Mr. Appling) We're going to leave the question of whether or not the [outstanding medical] bills have been paid open until we can verify that.

(Mr. Stamper) Counsel for claimant agrees.³

¹ The Notice of Preliminary Hearing pertaining to the April 2002 hearing, which was prepared by claimant's attorney, indicates that neither respondent nor its attorney were provided with notice of that hearing.

² See the Notice of Preliminary Hearing filed April 23, 2002.

³ Transcript of May 21, 2002 hearing, at pp. 21 and 22.

First, preliminary hearing findings are subject to modification as the facts develop. Second, because claimant failed to notify respondent or its attorney of the April 2002 hearing, the first opportunity that respondent had to address the issue of whether claimant was an employee on the date of accident was at the May 2002 hearing. The Judge did not err by addressing in the May 21, 2002 Order whether claimant was an employee of respondent on the date of the alleged accident.

Claimant argues the Judge erred by finding that claimant was not respondent's employee on the date of the alleged accident. After reviewing the record compiled to date, the Board affirms the Judge's finding in that regard. Claimant was allegedly hired on September 1, 2001, but did not have any contact with anyone at Border Town Trucking other than driver Kenny Weber before the September 21, 2001 accident date. At no time did claimant prepare an application for employment, or apparently prepare any other paperwork, for respondent. According to the testimony of co-owner Edward Sheen, he did not hire claimant and Mr. Weber did not have either actual or apparent authority to hire claimant to work for respondent. The Board concludes claimant has failed to prove that he was an employee of respondent at the time of the alleged accident.

In his brief to the Board, claimant argues that he should be considered a statutory employee of respondent under K.S.A. 44-503. Claimant also argues that estoppel now prevents the Fund from denying liability. The Board disagrees. During the preliminary hearing stage of a claim, the parties are allowed to change their position as the facts are discovered.

The Judge did not address claimant's request for penalties in the May 21, 2002 Order. As the parties concluded the May 2002 hearing with a statement that they were "going to leave the question of whether or not the [outstanding medical] bills have been paid open until we can verify that," it is unclear whether the Judge intended the denial of benefits in the May 21, 2002 Order to include a denial of the penalties request or whether the Judge intended to address the penalties issue at a later time, once the parties learned the status of the medical bills in question.⁴

WHEREFORE, the Board affirms the May 21, 2002 Order denying claimant's request for benefits. Further, the Board denies claimant's request for penalties against the respondent and the Workers Compensation Fund.

IT IS SO ORDERED.

⁴ Nevertheless, claimant seeks penalties from the Fund, which is not contemplated by K.S.A. 44-512a as the statute only allows penalties to be assessed against the employer or its insurance carrier. See *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 730, 587 P.2d 927 (1978). Furthermore, the request for penalties against respondent is not proper as respondent was not given notice of the April 2, 2002 preliminary hearing and, accordingly, the April 2, 2002 Order was not binding against it.

Dated this ____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Alexander Mitchell, II, Attorney for Respondent
Garry L. Howard, Attorney for Fund
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director